IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-419

JOS. SCHLITZ BREWING CO., *Petitioner,*

v.

ROBERT E. SMITH, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MATTHEW E. MURRAY
RODY P. BIGGERT
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603

Attorneys for Petitioner,
Jos. Schlitz Brewing Co.

Of Counsel:

THOMAS P. GIES
GARRETT E. BROWN

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 350
1800 M Street, N.W.
Washington, D.C. 20036

STRYKER, TAMS & DILL
33 Washington Street
Newark, New Jersey 07107

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CITATIONS

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Petitioner, Jos. Schlitz Brewing Co., respectfully prays that a Writ of Certiorari issue to review the opinion, judgment and order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported unofficially at 17 FEP Cases 1188 and is reproduced herein as Appendix A. The decision of the district court is reported unofficially at 17 FEP Cases 1188 and is reproduced herein as Appendix B. A previous opinion of the district court is reported at 419 F. Supp. 770 and is reproduced herein as Appendix C.

JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on July 14, 1978, (Appendix A). Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Third Circuit, in reversing the judgment of the district court and overruling its own prior decisions, erred in finding that the commencement of proceedings before a state agency is not required before bringing an action in federal court under the Age Discrimination in Employment Act of 1967, where there is a state agency empowered by statute to conduct such proceedings.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein include relevant portions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (hereinafter referred to as the "ADEA"), and are reproduced in Appendix D. In particular, section 14(b) of the ADEA provides,

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty (60) days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . .

29 U.S.C. § 633(b).

Other relevant statutory provisions involved are section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(c), and the New York Human Rights Law, N.Y. Exec. L. § 270, *et seq.*, and are also reproduced in Appendix D.

STATEMENT OF THE CASE

Petitioner, Jos. Schlitz Brewing Co. ("Petitioner") employed Respondent, Robert E. Smith ("Respondent") for some twenty years as Industrial Manager at its Brooklyn, New York brewery. Respondent was retired in December, 1973, following the shutdown of the Brooklyn plant in March of that year, and after efforts by Petitioner to locate another job for Respondent proved unsuccessful.

Believing he had been discriminated against because of his age in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), Respondent initiated this action in December, 1975, in the United States District Court for the District of New Jersey. Respondent admittedly did not commence proceedings under the New York Human Rights Law, N.Y. Exec. L. § 290 *et seq.*, prior to bringing this action.[1]

Petitioner moved to dismiss Respondent's complaint because of his failure to commence proceedings before an appropriate state agency prior to instituting an action in federal court, as required by section 14(b) of

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[1] The parties agreed that New York was the appropriate state in which Respondent could have sought relief for his claim of age discrimination (App. A at 3a).

the ADEA, 29 U.S.C. § 663(b). *See, Goger* v. *H.K. Porter Co.*, 492 F.2d 13 (3rd Cir. 1974). The district court denied Petitioner's motion. *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D.N.J. 1976) (App. C). The court therein concluded that section 14(b) of the ADEA imposes no jurisdiction prerequisite on an ADEA plaintiff, and, therefore, that Respondent was not required to commence proceedings under the New York Human Rights Law prior to bringing this action. 419 F. Supp. at 774.

Petitioner subsequently filed a renewed motion for summary judgment, again asserting lack of jurisdiction in view of Respondent's failure to commence proceedings before an appropriate state agency before filing an ADEA action in federal court. Petitioner's renewed motion largely was premised on subsequent decisions of the Third Circuit establishing the section 14(b) requirement as a jurisdictional prerequisite to commencing an ADEA action. *See Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977), *cert. denied*, 434 U.S. 575 (1978). The district court subsequently granted Petitioner's renewed motion, relying primarily on *Rogers, supra*, and entered summary judgment accordingly (App. B).

The Third Circuit, on July 14, 1978, reversed *Rogers* and *Goger* and held that resort to state agency discrimination remedies is not a precondition to maintaining a federal ADEA action. *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, No. 77-1867, 17 FEP Cases 1175 (3rd Cir., July 14, 1978) (*en banc*). The district court's judgment in the instant case accordingly was reversed. *Smith* v. *Jos. Schlitz Brewing Co.*, No. 77-1745, 17 FEP Cases 1188 (3rd Cir., July 14, 1978) (App. A).

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided an Important Question of Federal Statutory Construction in Direct Conflict With Indistinguishable Decisions of Other Appellate Courts

The question of whether an ADEA plaintiff must initially resort to a state agency authorized to resolve complaints of age discrimination has proved most difficult for the lower courts to resolve, including the circuit within which this case arises. The result has been a series of conflicting decisions, both among and within the various circuits, which demands resolution by this Court. *Maggio* v. *Zeitz*, 333 U.S. 56 (1948); *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180 (1939).

The Third Circuit, for example, has expressed no fewer than three different opinions as to the extent to which an ADEA plaintiff is obligated to pursue state administrative remedies before filing an action in federal court. In *Goger, supra*, the court held that initial resort to a state agency by an ADEA plaintiff is required by section 14(b) of the ADEA, at least to the extent that the state "be given a threshold period of sixty days in which to resolve the controversy," 492 F.2d at 15. The *Goger* court further held that certain equitable considerations might warrant an excuse from this requirement.[2]

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[2] The *Goger* court excused the plaintiff's noncompliance with section 14(b) of the ADEA, because of the "total absence" of any judicial decision construing the deferral provision. 492 F.2d at 17. Judge Garth concurred in the result, but viewed section 14(b) as imposing no requirement on an ADEA plaintiff to attempt to utilize available state remedies before initiating an ADEA action. 492 F.2d at 17-18.

In *Rogers, supra,* the court reaffirmed *Goger,* holding that the initial deferral requirement of section 14(b) of the ADEA is jurisdictional. 550 F.2d at 843-44. Then, in *Holliday, supra,* the appellate court expressly overruled both *Goger* and *Rogers,* concluding that "no prior resort to state agency procedures is required as a precondition" to commencing an ADEA action. 17 FEP Cases at 1181. The *Holliday* court began its reexamination of the deferral issue with the acknowledgement that the decisions in this area are in conflict:

> The proper interpretation of Section 633(b), requiring as it does the harmonization of admittedly mixed statutory signals, has understandably given rise to a multitude of cases and, inevitably to differences in result. Those courts which followed our Goger decision have in large part adopted the majority's analysis and, by analogizing section 633(b) to the purportedly comparable provision in Title VII (42 U.S.C. § 2000e-5(c)), have required resort to state age discrimination remedies before federal suit may be instituted. Other courts and jurists, the administrative agency charged with enforcement of the ADEA, a joint congressional committee, and certain commentators have cited the *Goger* concurrence and have agreed with the analysis in that opinion that section 633(b) of the ADEA affords the plaintiff an initial choice of forum.
>
> *Recognizing the conflict that existed among the various statutory interpretations and faced with increased instances of claimants who had not resorted to state remedies,* or had done so in an untimely fashion, and further aware of the policy considerations which inclined toward the complainant's choice of forum, we deemed it appropriate to once more examine the issue decided in *Goger.*

17 FEP Cases at 1177-78 (footnotes omitted). (emphasis added).

The *Holliday* opinion, relied on by the appellate court in the instant case, is admittedly at odds with the decisions and reasoning of several other circuits. Thus, the Second Circuit in *Reich* v. *Dow Badische Co.,* No. 76-7637, 17 FEP Cases 363 (2d Cir., April 4, 1978), recently affirmed the dismissal of an ADEA action because of plaintiff's failure to commence proceedings under the identical state statute involved in the instant case, the New York Human Rights Law, as well as for failure to satisfy the requirement of section 7(d) of the ADEA that a plaintiff give written notice of intent to sue with the United States Department of Labor within sixty days before he files suit. Recognizing the similarity between section 14(b) of the ADEA and a virtually identical provision contained in Title VII of the Civil Rights Act of 1965, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII"),[3] and with the recognition that initial deferral to an available state agency is "fundamental to the ADEA structure," the *Dow Badische* court concluded that the plaintiff's failure to comply with section 14(b) was a bar to maintaining an ADEA action. 17 FEP Cases at 367.[4]

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[3] Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(c) requires initial deferral of Title VII claims to appropriate state agencies. Commencement of proceedings before such an agency is a jurisdictional prerequisite to maintaining a Title VII action *Love* v. *Pullman Co.,* 404 U.S. 522 (1972).

[4] Judge Danaher's concurrence and Judge Feingerg's dissent in *Dow Badische* further illustrate the need for this Court's clarification of the question posed herein.

The Ninth and First Circuits have similarly followed *Rogers* and *Goger* in *Curry* v. *Continental Airlines,* 513 F.2d 691 (9th Cir. 1975), and *Hadfield* v. *Mitre Corp.,* 562 F.2d 84 (1st Cir. 1977) respectively, to the effect that section 14(b) of the ADEA imposes a prior resort requirement on an ADEA plaintiff. The Sixth Circuit in *Gabriele* v. *Chrysler Corp.,* 573 F.2d 949 (6th Cir. 1978) has refused to follow the *Goger* analysis, concluding rather that an ADEA plaintiff has an option of pursuing state remedies or proceeding directly into federal court. 573 F.2d at 955.

The Eighth Circuit has exhibited the same ambivalence as the Third Circuit. In *Evans* v. *Oscar Mayer & Co.,* No. 77-1692, 17 FEP Cases 221 (8th Cir., April 5, 1978), the court concluded that initial report to an available state agency is compelled by Section 14(b) of the ADEA. Some three months later, following the Sixth Circuit's *Gabriele* decision, the Eighth Circuit withdrew its first opinion in *Evans,* noted the conflicting authorities, and adopted the view of the Sixth Circuit. *Evans* v. *Oscar Mayer & Co.,* No. 77-1692, 17 FEP Cases 1119, 1121 (8th Cir., July 6, 1978). District Court opinions are equally inconsistent.[5]

In summary, the Circuits are in open disagreement and clarification of the ADEA's state agency deferral provision by this Court is thereby mandated.

II. The Decision of the Lower Court Misconstrues an Important Jurisdictional Prerequisite of the ADEA

The Third Circuit's opinion in this case was based squarely on *Holliday.* In *Holliday,* the court rejected

[5] *See Holliday* v. *Ketchum, MacLeod & Grove, supra,* 17 FEP Cases at 1177 and cases cited therein.

the statutory construction given section 14(b) in *Goger,* and concluded that prior resort to an available state administrative agency was not required. Citing the Court's decision in *Lorillard* v. *Pons,* 434 U.S. 575 (1978), the court rejected the analogy made in *Goger* between section 706(c) of Title VII and section 14(b) of the ADEA. The court pointed to other ADEA statutory language dictating that a federal ADEA action "shall supersede any state action" as reason for lesser deference to state procedures than under the Title VII enforcement mechanism. A second supposed distinction noted between section 706(c) of Title VII and section 14(b) was that Title VII provides that "no charge may be filed . . . before the expiration of sixty days," while the comparable ADEA provision states that "no suit may be brought . . . before the expiration of sixty days."

The court interpreted this statutory difference, which allows charges to be filed with the Department of Labor immediately under the ADEA with the possibility of concurrent administrative action by the state and federal agencies, was interpreted as further evidence of lesser deference to state procedures under the ADEA. The court also mentioned the construction of section 14(b) urged by the Secretary of Labor, and cited a passage in a Senate Report accompanying the 1978 amendments to the ADEA, both to the effect that section 14(b) should not be interpreted as imposing a prior resort requirement. Finally, the court noted the remedial purpose of the ADEA, which it felt would be frustrated by forcing an employee to commence proceedings before an appropriate state agency before proceeding in federal court, and concluded that reversing *Goger* would result in a "more straightforward ap-

proach to fulfilling the remedial purposes of the ADEA." 17 FEP Cases at 1181, n.36.

Nevertheless, the Third Circuit's decision is anything but straightforward. In 1967, Congress passed the ADEA, and devised what it determined to be the preferable and most efficient procedure for resolving claims of age discrimination. That scheme provided for both the Department of Labor and an appropriate state agency to have an opportunity to settle a charge. The Third Circuit, however, while contributing mightily to the confusion in this area of the law, effectively rewrote the ADEA charge handling procedure by giving an aggrieved individual his "option" of pursuing state administrative remedies.

The premise for this improper judicial legislation was the Holliday court's view that the language of section 14(b) differs from that of the comparable provision in Title VII. The announced differences between the two provisions were previously viewed as "minor" by the court in *Goger,* which characterized the two provisions as "virtually identical." *Goger* v. *H.K. Porter, supra,* 492 F.2d at 15; *Curry* v. *Continental Airlines, supra,* 513 F.2d at 693.

This Court's intervening decision in *Lorillard* v. *Pons, supra,* contrary to the opinion of the court below, does not call the *Goger* statutory analysis into question. In *Lorillard,* this Court determined that the ADEA provided a private plaintiff with a right to jury trial. After observing that the ADEA represents a "hybrid" of the various alternative proposals pending in Congress when the Act was passed, the Court found that the ADEA's enforcement mechanism resembled that of the Fair Labor Standards Act, 29

U.S.C. §201 *et seq.,* ("FLSA") and concluded that the right to a jury trial under the latter statute should obtain under the former. 434 U.S. at 580. The Court in *Lorillard* rejected the employers comparison of the ADEA and Title VII in that context, noting that the ADEA's remedial provisions were seemingly patterned after those of the *FLSA,* in that actions for money damages were plainly anticipated. 434 U.S. at 579. The Court in *Lorillard* clearly did not reject every comparison between Title VII and the ADEA and its holding properly is limited to the facts before it. *See, Murphy* v. *American Motors Sales Corp.,* 570 F.2d 1226 (5th Cir. 1978). Comparison between the two statutory schemes is fully appropriate in this case, where it is apparent that an ADEA provision has been derived from Title VII, *Bertsch* v. *Ford Motor Co.,* 415 F. Supp. 619, 623 (E.D. Mich. 1976). Thus, there is no reason to adopt an interpretation of the ADEA contrary to the Supreme Court's construction of the related Title VII provision in *Love* v. *Pullman, supra, Goger* v. *H.K. Porter, supra,* 492 F.2d at 16.

In the instant case, the Third Circuit improperly extended the *Lorillard* rationale to a situation involving the very different question of how to interpret the section 14(b) deferral requirement of the ADEA. As the Second Circuit noted in *Dow Badische,* such a view is the result of a misreading of the legislative intent of this provision:

> Much of appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest of showing will warrant setting the bar of Section 633(b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, pre-

> sented appellants with a full and adequate system of relief, that there was no reason for turning to the federal remedy that did not equally direct appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing.

17 FEP Cases at 368.

The appellate court similarly erred in relying on language in a 1978 Senate Report accompanying recently-enacted amendments to the ADEA. 17 FEP Cases 1180-81. As the court acknowledged, such reliance is hazardous, and particularly so where the report consists of nothing more than the unsolicited expression of opinion of a Senate committee staff. Section 14 of the ADEA was not amended in 1978, and the question of the proper interpretation to be given Section 14(b) in the context of this case was not the topic of debate. Such "legislative history", eleven years after the fact, must not be given much weight by this Court. The views of the Secretary of Labor in this regard, adopted well after the passage of the ADEA, are equally insufficient to support a statutory interpretation inconsistent with the evidenced intent of Congress. *Cf., General Elec. Co.* v. *Gilbert,* 429 U.S. 129 (1976). Finally, the recognition of the remedial purposes of the ADEA does not warrant a court's refusal to adhere to a statutory enforcement scheme created by Congress. *Reich* v. *Dow Badische Co., supra,* 17 FEP Cases at 370.

This case thus presents the Court with the opportunity to resolve a critical question concerning the role of the states in ADEA enforcement. As acknowledged by the Third Circuit in this case, a very large number of cases have and will continue to present the problem of an ADEA claimant who has failed to pursue available state remedies before filing an ADEA action, only to be confronted with inconsistent judicial response to the problem. This important issue must be resolved.

CONCLUSION

Congress plainly envisioned that the states play an important role in attempting to resolve complaints of age discrimination. The decision of the Third Circuit in *Holliday,* as followed in the instant case, is in admitted conflict with the Second Circuit's decision in *Dow Badische.* It is also contrary to the Ninth Circuit's reasoning in *Curry* and the First Circuit's view in *Hadfield.* This case, therefore, advances a vital threshold question with respect to the most appropriate procedure for quickly redressing claims of age discrimination.

For the foregoing reasons, Petitioner prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

MATTHEW E. MURRAY
RODY P. BIGGERT
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603

Attorneys for Petitioner,
Jos. Schlitz Brewing Co.

Of Counsel:

THOMAS P. GIES
GARRETT E. BROWN
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 350
1800 M Street, N.W.
Washington, D.C. 20036

STRYKER, TAMS & DILL
33 Washington Street
Newark, New Jersey 07107

APPENDIX

APPENDIX A

U.S. COURT OF APPEALS, THIRD CIRCUIT (PHILADELPHIA)

No. 77-1745

SMITH v. JOS. SCHLITZ BREWING CO.

Full Text of Opinion

GARTH, Circuit Judge:—Again, we are presented with an appeal involving an employee's failure to resort to state age discrimination remedies before instituting federal suit under the Age Discrimination in Employment Act of 1967 (ADEA).[1] Our court in Goger v. H. K. Porter Co., Inc., 492 F.2d 13, 7 FEP Cases 71 (3d Cir. 1974), had previously required that resort must first be had to state administrative proceedings. We had then held in Rogers v. Exxon Research & Engineering Corp., 550 F.2d 834, 844, 14 FEP Cases 518, 525-526 (3d Cir. 1977), cert. denied, 98 S.Ct. 749, 16 FEP Cases 501 (1978), that such prior state resort was a "jurisdictional" prerequisite. Today, however, we have overruled Goger and its progeny, and have "h[e]ld that resort to state age discrimination remedies is not a precondition to maintaining a federal suit for age discrimination." Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-1867, at 2, 17 FEP Cases 1175 (3d Cir. July 14, 1978) (in banc). Thus, we reverse the district court's order of summary judgment in favor of Joseph Schlitz Brewing Company (Schlitz), the employer, and remand for further proceedings.

I.

The plaintiff, Robert E. Smith, a New Jersey resident, was hired by Schlitz on October 20, 1952. Throughout his employment, he served as Industrial Relations Manager of the Schlitz brewery in Brooklyn, New York. As early as 1969, Schlitz began formulating plans to close its Brooklyn

[1] Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621 et seq.

brewery. Beer production at the Brooklyn plant ceased in March, 1973. The plant was sold toward the latter part of that year, and from March through December of 1973 Smith continued to serve as resident manager. Although Schlitz was then planning to open a new brewery in Syracuse, New York, at no time did Schlitz offer to employ Smith at, or relocate him to, the new facility. Thus, on December 31, 1973, Smith was forced into involuntary retirement at age 62.[2]

Smith, claiming that Schlitz's actions violated the ADEA,[3] sought assistance from those administrative agencies charged with combating age discrimination in employment.[4] Smith alleged that he first visited the New York City

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[2] Apparently, the mandatory retirement age for all Schlitz employees is 65. Amended Complaint ¶ 4.

[3] 29 U.S.C. § 623(a) provides that:

It shall be unlawful for an employer——

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age;* . . .

(Emphasis added.) See Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978) (codified at 29 U.S.C.A. § 623(f)(2) (Supp. 1 June, 1978)) ("no . . . seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual"); H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 2, reprinted in [1978] U.S. Code Cong. & Ad. News 100, 1001 (retirement plans in effect before the enactment of the ADEA are *not* exempt from § 623(f)(2)).

Discussions of age discrimination and of the ADEA are furnished in Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1976); Note, *Age Discrimination in Employment*, 50 N.Y.U. L. Rev. 924, 945-51 (1975). The 1978 amendments to the ADEA are highlighted in Explanatory Notes, 46 LW 53-57 (May 9, 1978).

[4] The actions which Smith took in pursuit of his claim are set forth in detail in an uncontroverted affidavit (hereinafter Smith Affidavit), which was filed in opposition to Schlitz's motion for summary judgment.

office of the United States Department of Labor (Department). There he was advised to file his complaint with that Department's office in Paterson, New Jersey because he resided in that state. Despite this direction, Smith contends that he nevertheless placed a telephone call to the New York State Human Rights Division in Manhattan.[5] "After a considerable conversation, consisting mostly of [the state representative] questioning [Smith]," [6] Smith was again advised to file his complaint with the Department office nearest his home. This advice was predicated upon the consideration that Schlitz was no longer conducting business directly in New York, and had no corporate or regional office there.[7]

Having been advised by both the Department and the New York Division of Human Rights that the proper office in which to lodge his complaint was the Department's office in Paterson, New Jersey, Smith did just that.

After the Department's conciliation attempts with Schlitz had failed, Smith instituted in federal court the present action charging age discrimination. Thereafter, Schlitz moved to dismiss the complaint, or in the alternative for summary judgment. Among other grounds for its motion,[8] Schlitz asserted that Smith had failed to satisfy the juris-

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[5] The parties agree that since the alleged acts of age discrimination occurred in the State of New York, the New York Division of Human Rights is the state authority with power "to grant or seek relief from such discriminatory practice" within the meaning of 29 U.S.C. § 633(b).

[6] Smith Affidavit, ¶ 4.

[7] Id. ¶ 5.

[8] The other grounds which were asserted, although not relevant to this appeal, were Smith's failure to notify the Secretary of Labor of his "intent to sue" as required by 29 U.S.C. § 626(d) (prior to 1978 amendment), and a concomitant failure to allege the date of the notice of intent to sue

dictional prerequisite contained in 29 U.S.C. § 633(b) requiring prior resort to state age discrimination remedies.[9]

The district court, construing Rogers v. Exxon Research & Engineering Corp., supra, to require strict compliance with this jurisdictional prerequisite, entered judgment for Schlitz.[10] The sole ground for this ruling was Smith's asserted failure to commence state age discrimination proceedings.[11]

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[9] 29 U.S.C. § 633(b) provides in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

[10] At an earlier proceeding the district court had denied Schlitz's motion to dismiss Smith's complaint, as it interpreted Goger not as a strict jurisdictional holding but as one that permitted equitable relief. 419 F.Supp. 770, 12 FEP Cases 1494 (D. N.J. 1976).

[11] See Civ. Docket No. 75-2216, Transcript of Proceedings at 2 (D. N.J. Feb. 14, 1977) (reproduced at Appellee's Appendix at 3). Schlitz's motion filed on Jan. 24, 1977, sought an order dismissing the complaint "or in the alternative, for summary judgment." Attached to the motion was the affidavit of Frederic W. Decker, Schlitz's Director of Compensation and Benefits. The district court's order of February 18, 1977, dismissed the complaint and granted summary judgment in favor of Schlitz. The preamble to that order recited that defendant's motion had been brought pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 56, and that the court had considered affidavits submitted by both parties. As noted, Smith had already submitted an affidavit in opposition to an earlier motion made by Schlitz. See n.4 supra. The district court therefore properly treated Schlitz's later motion as one for summary judgment. See Fed. R. Civ. P. 12(c).

II.

On February 17, 1978, the date on which we heard oral argument in Smith's appeal, our court had pending before it at least one other appeal brought by an ADEA claimant who had been denied relief because he too had failed to resort to state age discrimination remedies prior to instituting a federal action.[12] In addition, our court in yet a third case was considering whether the Secretary of Labor must resort to state remedies before bringing an age discrimination suit in federal court.[13] These filings brought to a total of at least six the number of section 633(b) cases instituted within just the last four years before our court alone.[14] Thus, our court entered an order to reconsider in banc the "jurisdictional prerequisite" issue as presented in Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-1867 (Order granting reconsideration *in banc* dated Mar. 13, 1978), one of the pending section 633(b) appeals.

Recognizing that the outcome of the *in banc* proceeding would control the instant case, we postponed decision in this appeal pending this court's decision in Holliday.[15] As

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[12] Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-1867, 17 FEP Cases 1175 (3d Cir. filed May 26, 1977).

[13] Marshall v. West Essex General Hosp., No. 77-1758 (3d Cir. argued Feb. 14, 1978), decided on other grounds, No. 77-1758, 575 F.2d 1079, 17 FEP Cases 702 (3d Cir. Apr. 28, 1978).

[14] Holliday v. Ketchum, MacLeod & Grove Inc., No. 77-1867, 17 FEP Cases 1175 (3d Cir. July 14, 1978) (*in banc*); Smith v. Joseph Schlitz Brewing Co., No. 77-1745 (3d Cir. July 14, 1978); Marshall v. West Essex General Hosp., No. 77-1758, 575 F.2d 1079, 17 FEP Cases 702 (3d Cir. Apr. 28, 1978); Bonham v. Dresser Indus., Inc., 569 F.2d 187, 16 FEP Cases 510 (3d Cir. 1977), petition for cert. filed, 46 LW 3695 (U.S. May 1, 1978) (No. 77-1562); Rogers v. Exxon Research & Engineering Co., 530 F.2d 834, 14 FEP Cases 518 (3d Cir. 1977), cert. denied, 98 S. Ct. 749, 16 FEP Cases 501 (1978); Goger v. H. K. Porter Co., Inc., 492 F.2d 13, 7 FEP Cases 71 (3d Cir. 1974).

[15] Counsel were notified of this action by the Clerk of this Court.

earlier noted, today we have held, "contrary to our holding in Goger, that no prior resort to state agency procedures is required as a precondition to commencing a federal action charging age discrimination under the ADEA." Holliday v. Ketchum, MacLeod & Grove, Inc., No. 77-1867, at 18, 17 FEP Cases, at 1181. Our opinion in Holliday, then, influenced as it is by the recent Supreme Court decision in Lorillard v. Pons, 434 U.S. 575, 46 LW 4150, 16 FEP Cases 885 (U.S. Feb. 22, 1978), as well as by "public policy concerns, congressional predilection, and our own unease with a judicial impediment to remedial legislation," No. 77-1867, at 17, 17 FEP Cases, at 1181, overturns the jurisdictional requirement imposed by Goger and Rogers, and instead now affords complainants under the ADEA an initial choice of forum.[16]

Here the district court, understandably relying upon this court's precedents, entered judgment for Schlitz, the employer, because Smith had failed to commence state proceedings before filing his federal action. Our decision in Holliday v. Ketchum rejects such a requirement. That ruling now controls this appeal, making it unnecessary to consider in Smith's case the need for, or possibility of, equitable relief. Thus, in light of Holliday v. Ketchum, the order of the district court will be reversed, and the case remanded for proceedings not inconsistent with this opinion.

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[16] Once a plaintiff has chosen the state route, however, the state must be afforded sixty days to pursue the age discrimination complaint before a federal suit may be filed. 29 U.S.C. § 633(b), quoted in part in n.9 supra. After the 60-day period, deference is no longer warranted; indeed, a federal suit filed by the complainant necessarily supersedes the state proceeding, regardless of the status of the latter. 29 U.S.C. § 633(a).

APPENDIX B

U.S. DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 75-2216, February 22, 1977

SMITH v. JOS. SCHLITZ BREWING CO.

Full Text of Order

STERN, District Judge:—This matter having come before the Court on defendant's renewed motion to dismiss the complaint, and in the alternative for summary judgment, for lack of subject-matter jurisdiction, pursuant to F.R.Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to F.R.Civ.P. 12(b)(6) and 56, and the Court having considered the briefs and affidavits submitted by both parties, and the Court having heard oral argument on February 14, 1977, and having considered same, and good and sufficient cause having been shown.

It is on this 18 day of February, 1977,

ORDERED, that defendants renewed motion to dismiss the complaint, and in the alternative for summary judgment, be, and it hereby is, granted.

APPENDIX C

UNITED STATES DISTRICT COURT, D. NEW JERSEY

Civ. A. No. 75-2216

May 28, 1976

Robert E. SMITH, Plaintiff,

v.

JOS. SCHLITZ BREWING COMPANY, Defendant.

Opinion

STERN, District Judge.

This matter comes before the Court on defendant's motion to dismiss the complaint for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), and in the alternative for summary judgment. By letter of April 7, 1976, the Court notified the parties that the portion of the motion brought under Rule 12 (b)(6) would be treated as a motion for summary judgment under Rule 56, as provided in Rule 12(b). Counsel presented oral argument to the Court on May 14, 1976, and decision was reserved.

Defendant premises its motion to dismiss on three arguments:

(1) The complaint fails to allege that plaintiff commenced procedures under New York's Human Rights Law, as defendant contends he was required to do before instituting suit, pursuant to 29 U.S.C. §§ 626(d) and 633(b), and therefore the Court lacks subject matter jurisdiction and the complaint fails to state a claim;

(2) Plaintiff failed to give notice to the Secretary of Labor of his intent to sue until October 6, 1975, beyond

the time limit established by 29 U.S.C. § 626(d), and therefore the Court lacks subject matter jurisdiction;

(3) Paragraph 12 of the complaint fails to state the date on which plaintiff gave notice to the Secretary of his intent to sue, and therefore the jurisdictional allegations of the complaint fail to meet the requirements of F.R.Civ.P. 8(a)(1).

I. FACTUAL BACKGROUND

Plaintiff's factual allegations, which the Court is required to take as proved for the purposes of these motions, may be briefly summarized.

Plaintiff is a New Jersey citizen who was hired by defendant on October 20, 1952. Throughout his employment with defendant, plaintiff was Industrial Relations Manager of defendant's Brooklyn brewery.

Plans to close the Brooklyn plant had begun to be formulated sometime in 1969. After the plant ceased production on March 16, 1973, plaintiff was appointed resident manager through December, 1973, to assist in the sale of the plant, its equipment and its machinery. On August 22, 1973, plaintiff had his 62nd birthday. According to defendant's rules and regulations, he would not have had to retire until age 65, or on or about August 22, 1976. Nevertheless, plaintiff was involuntarily retired by defendant on December 31, 1973.

Plaintiff contends that "as early as 1969," he had discussed his future status with defendant in light of defendant's known intention to close the Brooklyn plant. Plaintiff alleges that he was repeatedly assured by defendant, both verbally and in writing, that when an Industrial Relations Manager's position became available he would be given the opportunity to take it. He was also assured, according to the complaint, that "all efforts would be made to retain the

plaintiff until he reached the mandatory retirement age of 65 . . . ." (Complaint, ¶ 6)

In late 1972, defendant considered plans for opening a plant in Syracuse, New York. Defendant announced these plans in May or June, 1973, and at that time expected to begin production in Syracuse by January 1, 1976. On several occasions during 1973, plaintiff discussed with representatives of defendant the possibility of his becoming Industrial Relations Manager of the Syracuse plant. The complaint alleges that plaintiff "was repeatedly advised by the defendant that he was being given every consideration for that position, although the plaintiff was not given every consideration for that position." (Complaint, ¶ 8)

It is further alleged that defendant "had commenced plans for interviews" for the Syracuse IRM position before plaintiff was involuntarily retired, and that a person was hired for that position in early 1974 and began his duties in that capacity even before his transfer to Syracuse in July 1974. Plaintiff therefore contends that the position in question existed at the time of plaintiff's forced retirement, but that it was not offered to him because of his age. The operative allegation of the complaint states:

> The defendant advised the plaintiff that the plaintiff would be 64 years of age when productions [sic] commenced in Syracuse and that the plaintiff could, therefore, not have that job.

(Complaint, ¶ 10) The complaint does not specify which representative of defendant made this representation to plaintiff.

Plaintiff contends that he learned only after his forced retirement that defendant maintained that it had failed to transfer him to the Syracuse plant on the grounds of his work experience and performance. He alleges that he was denied transfer to the Syracuse job solely because of his

age, and that defendant thereby wilfully violated the Age Discrimination in Employment Act of 1967 (ADEA), Title 29 United States Code, §§ 621, *et seq.*

II. Legal Analysis

A. Failure to file complaint under New York Human Rights Law.

Title 29 United States Code, § 626(d) provides as follows:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon reeciving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Title 29 United States Code, § 633(b) provides in pertinent part as follows:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing

> or authorizing a State atuhority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .

The United States Court of Appeals for the Third Circuit interpreted the requirements of these two sections in *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974). *Goger* involved a suit by plaintiff against her former employer for terminating her employment on grounds of age. The district court dismissed the suit for lack of jurisdiction, holding that the ADEA required plaintiff to submit a complaint to the appropriate New Jersey state agency at least 60 days before instituting an action in federal court.

On appeal, Judge Hunter identified the issue as whether § 663(b) required the plaintiff to seek redress initially before the appropriate state agency, assuming that one existed, before beginning suit in federal court. Plaintiff Goger had not done so; rather, her counsel had notified the Secretary of Labor under § 626(d) shortly after she was dismissed. The Secretary's attempts to achieve a voluntary disposition were in vain, and the Secretary's compliance officer had advised plaintiff that she was free to institute suit.

In the face of the arguments of Goger, and of the Secretary of Labor as *amicus*, that the ADEA gives an aggrieved individual a choice of pursuing federal or state remedies rather than requiring that individual to seek rdress first from a § 633(b) state agency if one exists in the state in which the alleged violation took place, Judge Hunter wrote:

> We agree with the district court, however, that although the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance.

492 F.2d at 15. Judge Hunter made an extensive comparison of the ADEA and Title VII of the 1964 Civil Rights Act. Nevertheless, the court vacated the decision of the district court on "equitable" grounds. Judge Hunter noted Goger's and the Secretary's argument that Goger's federal complaint should not be barred because she filed in federal court only after seeking relief from the Department of Labor, and after a Labor Department compliance officer had advised her that she was free to file suit. Judge Hunter wrote:

> While we do not consider the failure to file a timely complaint with the appropriate state agency a mere "technical" omission [footnote omitted], we nonetheless consider equitable relief to be appropriate in view of the total absence to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view of the remedial purpose of the 1967 Act. [footnote omitted] In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced. [citation omitted]
>
> *For the reason stated in the first sentence of this paragraph, we need not decide on this record whether a plaintiff must always proceed first before the state agencies.*

492 F.2d at 16-17. (Emphasis added)

In the Court's view, the underlining passage confirms that *Goger* does not hold what defendant asserts that it holds: that in this Circuit failure to proceed first before a § 633(b) agency is a jurisdictional defect. The majority opinion must be considered in the context of Judge Garth's concurring opinion, in which he asserts:

> The various dissimilarities between the two Acts (and in particular the presence of § 633(a) [footnote citing text of § 633(a) omitted] in ADEA, which has no counterpart in Title VII) impel me to the conclusion that there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act. . . .
>
> I do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633(d), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a).

492 F.2d at 17-18. The holding of the Court of Appeals in *Goger* is limited to the facts of that case, and the court specifically declined to hold that a state proceeding must always be commenced, where appropriate under § 633(b), before the federal action lies.

Those courts which have considered this issue since *Goger* have split on the question. Dictum by the Ninth Circuit expresses agreement with Judge Hunter's majority opinion, but disposes of the case on the ground that there was no state agency in California which qualified under § 633(b). *Curry v. Continental Airlines,* 513 F.2d 691, 693 (9th Cir. 1975). *Cf. Garces v. Sagner International, Inc.,* 534 F.2d 987 (1st Cir. 1976). The district court opinions are split. In *Vaughn v. Chrysler Corp.,* 382 F.Supp. 143 (E.D.Mich.1974), the court held that § 633(b) created a

jurisdictional requirement that plaintiff pursue remedies before a state agency if the agency qualifies under § 633 (b), and that this jurisdictional requirement "can be waived only when the plaintiff has justifiably and detrimentally relied upon official advice in neglecting to pursue state remedies." 382 F.Supp. at 146. The court cited *Goger* as an example of justifiable detrimental reliance. The *Vaughn* court held that in the case before it the plaintiff had failed to show "detrimental reliance or the like which would influence the Court in the exercise of its equitable discretion. The failure of the complaint to set forth a timely resort to state remedies is, therefore, a fatal jurisdictional defect as to the plaintiff Vaughn." 382 F.Supp. at 146.

The two most reecnt district court decisions hold otherwise. In *Skoglund v. Singer Co.,* 403 F.Supp. 797 (D.N.H. 1975), plaintiff filed with the state agency seven months after the alleged act. The law of Massachusetts, the state in which the discrimination was alleged to have occurred, required such filing to be made within six months. Thus plaintiff was barred from state relief, and the district court was faced with the issue whether plaintiff's failure to file timely before the state agency precluded the federal court from taking jurisdiction. After reviewing the cases which had interperted the ADEA's various filing requirements strictly, Judge Bownes held:

> I do not believe that plaintiff's failure to timely comply with Section 633(b) deprives this court of the power to hear this case. There is no indication in either the history or the wording of ADEA that the Section 633(b) requirement is jurisdictional. . . . I find that, although Section 633(b) requires timely resort to state remedies before a complaint may be filed in federal court, this requirement is not jurisdictional; therefore, plaintiff's failure to notify the

> Massachusetts Commission Against Discrimination in a timely fashion does not bar him from this court.

403 F.Supp. at 802-803.

The court cited a recent declaration of the Supreme Court:

> Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

Love v. Pullman Co., 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679 (1972) (failure to comply with procedural technicality under Title VII deferral to state agenices held no bar to federal suit).

The most recent case involving the requirements of § 633(b) is *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353 (D.P.R. 1975). After an exhaustive examination of the legislative history of the ADEA, and specifically endorsing Judge Garth's opinion in *Goger*, Judge Pesquera wrote:

> The legislative history of the ADEA is thus devoid of any indication that Congress intended to restrict an individual's right to file suit under the Federal law to cases in which proceedings had first been commenced under State law, and this indication cannot be supplied by looking at the legislative history of Title VII. . . So far as the ADEA is concerned, *the sole Congressional purpose underlying the enactment of Section 14* [29 U.S.C. § 633] *was to give the State time to act on a complaint if the aggrieved chose to proceed there first.* To hold otherwise would be to create a procedural pitfall for unsuspecting individuals which could easily serve, as it did in the instant case . . . to deprive aggrieved individuals of their day in court, thereby thwarting the objective of this

> remedial legislation, whose declared purpose, as stated in Section 2(b) of the Act (29 U.S.C. § 621(b)), is "to promote the employment of older [workers] based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."

405 F.Supp. at 1357. (Emphasis added)

After consideration of all the decided cases, this Court holds that § 633(b) creates no jurisdictional requirement. The language of that section carefully avoids what would have been a simple statement of an exhaustion requirement, and suggests only that if a state proceeding is brought, the state agency should be given 60 days to act before the federal proceeding supplants it. *See* Title 29 United States Code, § 633(a).

Accordingly, defendant's motion to dismiss the complaint, and in the alternative for summary judgment, on the basis of plaintiff's failure to commence proceedings under the New York Human Rights Law will be denied.

B. Notification of the Secretary of Labor of intent to sue.

The Act provides for two alternative time limits for filing of notice of intent to sue with the Secretary of Labor. Title 29 United States Code, § 626(d). The statute provides that no civil action may be commenced under the Act until the prospective plaintiff gives the Secretary at least 60 days' notice of an intent to file the action. The notice must be filed with the Secretary within 180 days of the alleged unlawful practice, except that "in a case to which section 633(b) of this title applies," the notice may be filed within 300 days of the alleged unlawful practice.

Since the Court has held that plaintiff was not required to commence proceedings under state law before bringing the instant civil action, it is appropriate to hold him to

the shorter filing period of 180 days. *Skoglund v. Singer Co., supra,* at 803.

Defendant does not contest that plaintiff filed a notice of intent to sue with the Secretary at least 60 days before filing the instant complaint. The issue is solely whether plaintiff fulfilled the filing requirement within the 180-day period of § 626(d)(1). Plaintiff was terminated by defendant on December 31, 1973. It is plaintiff's contention that his notice of intent to sue was filed with the Secretary on June 17, 1974. Defendant maintains that the notice was not filed until October 2, 1975. The instant action was commenced on December 23, 1975.

Plaintiff states by affidavit that he visited the Paterson, New Jersey office of the Department of Labor on June 17, 1974. At that time he apparently lodged an oral complaint with the Department, and submitted copies of his correspondence with defendant. The first written evidence of plaintiff's complaint is his letter dated June 25, 1974 to the Area Director of the Wage and Hour Division of the Department of Labor in Milwaukee, defendant's principal place of business. The letter briefly summarizes plaintiff's complaint and makes reference both to the June 17 meeting with a compliance officer in the Paterson office of the Division, and to the supporting correspondence which was apparently filed in Paterson on June 17 for forwarding to Milwaukee.

Plaintiff concedes that neither the June 17 oral complaint nor the June 25 letter specifically set forth an intent to sue:

> When the Plaintiff notified the Secretary on June 17, 1974, he set forth in detail the nature of his grievance against the Defendant and the basis for which he was making such a charge. It is conceded that the Plaintiff did not specifically state that he intended to sue Schlitz in his initial claim filed with the Secretary. The Plaintiff submits, however, that the notice given was satisfactory to satisfy Section 626(d) of "the Act."

Brief of Plaintiff, at 4. No such specific notice of intent to sue was filed until October 2, 1975, well beyond either the 180- or 300-day period.

Plaintiff contends that an aggrieved individual's obligation to notify the Secretary is fulfilled "if an employee within 180 days of his discharge advises the Secretary that he has been discharged from his employment because of an alleged Act of Discrimination based upon age." (Brief, at 4) Plaintiff relies on *Woodford v. Kinney Shoe Corp.,* 369 F.Supp. 911 (N.D.Ga.1973). In that case, plaintiff made an oral complaint to the Labor Department 160 days after the alleged violation. The Department processed the complaint and told her that it had been timely filed, but that the Department had 60 days to attempt conciliation. Her formal notice of intent to sue was not filed until she had retained a lawyer, about 250 days after the unlawful act. Chief Judge Smith wrote:

> This court holds that where an employee, within one hundred eighty days of his discharge, reports to the Labor Department that he has been discharged from his job because his employer discriminates against older workers, the employee's right to file suit later under the Age Discrimination Act is preserved, even if the employee does not in so many words declare to the Department his intent to file such an action.
>
> The persons making complaints to the Department will in the most part not be lawyers; they should not be compelled to adhere to strict rules of pleading merely to preserve their right to come to court to enforce their right to be free of discrimination [in] employment because of their age. If they are to be able to enforce the Age Discrimination Act, their complaints should be construed not narrowly and technically, but broadly and liberally. Where the employee identifies himself and his employer and reports facts which, if true, would support a cause of action pursuant to the

> Act, the Labor Department should assume that the aggrieved employee will take whatever steps are necessary to enforce his rights, including court action; thus, an intent to file suit is implied in a complaint of age discrimination in employment.

369 F.Supp. at 915.

The court's analysis of the Act's purpose in *Woodford* was expressly endorsed by the Eighth Circuit in *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975). Though that case turned on the determination of the date of the unlawful occurrence, the Court observed:

> The Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination. *See Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911, 914-15 (N.D.Ga.1973). A procedural requirement of the Act, of doubtful requirement of the Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act. *Id.*, at 914-15.

525 F.2d at 93-94. The court observed that most courts have regarded the timely filing of a notice of intent to sue as a jurisdictional requirement, citing *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, 487-488 (5th Cir. 1974), but held that the plaintiff's actions in *Moses* were not to be considered a failure to file a timely notice.

The *Moses* court identified the purpose of the 180-day requirement:

> The 180-day notice requirement is intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes when disputes are fresh and by informing the employer of his

> employee's intentions at an early date. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974). See also *Powell v. Southwestern Bell Telephone Co.*, supra, 494 F.2d at 488.

525 F.2d at 94.

Application of this reasoning to the facts here leads this Court to conclude that no substantial purpose of the Act would be furthered by barring plaintiff's complaint. The correspondence submitted to the Court by both parties makes clear that the complaint made by plaintiff on June 25, 1974 was immediately assigned to a Labor Department compliance officer. The same procedure was followed by the Department in *Goger* after the plaintiff, through counsel, filed a letter that did specifically state an intent to sue. 492 F.2d at 14-15. For all purposes contemplated by the statute, therefore, the June 25 letter put the instant matter before the Secretary, and he was enabled by the complaint and the correspondence furnished by plaintiff to proceed with whatever voluntary conciliation proceedings he desired to conduct. The Department's letter of July 11, 1974 makes specific reference to those conciliation, conference and persuasion procedures.

The second goal of the notice requirement, as analyzed by the Eighth Circuit in *Moses*, is to inform the employer of the employee's pending grievance. Defendant relies on *Dartt v. Shell Oil Co.*, 10 FEP Cases 844 (D.Okla.1975), in which the court held that the 180-day requirement was jurisdictional, and that the mere filing of a complaint with the Department of Labor without mentioning an intent to sue did not satisfy the statute. The court held that the purpose of the 180-day provision was to ensure "that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination." 10 FEP Cases at 848.

Since the Secretary does not automatically notify the potential defendant until a letter specifically stating "I intend to sue" is received, defendant argues, construction of a mere complaint letter as a notice of intent to sue thwarts a substantial purpose of the 180-day requirement.

It is true that the Secretary did not inform Schlitz of plaintiff's complaint until the Department received the formal "intent to sue" letter dated October 2, 1975. The Department sent Schlitz formal notification of Smith's intent to sue by letter of October 6, 1975, its only notice to Schlitz, and set up a conference between a compliance officer and a Schlitz representative. *See* Affidavit of William R. Young. It is nevertheless clear, however, that plaintiff and defendant had been in regular correspondence with regard to plaintiff's grievance for a substantial period of time between plaintiff's termination in December, 1973 and plaintiff's first contact with the Department of Labor in June, 1974. Plaintiff's June 25 letter to the Department states that copies of correspondence between plaintiff and defendant's Vice President in charge of Industrial Relations and defendants's President and Chairman of the Board were submitted to the compliance officer in Paterson, and the Department's July 11, 1974 letter to plaintiff confirms that this correspondence was filed. Defendant can hardly contend that it was unaware of plaintiff's grievance. It would be unrealistic to suggest that defendant was ignorant of the intentions of a management employee who had prosecuted his grivance in so assidious a manner. Both *Dartt* and defendant rely on *Powell v. Southwestern Bell Telephone,* 494 F.2d 485 (5th Cir. 1974), in which the court held the 180-day requirement to be jurisdictional, and commented:

> It is logical that the 180 day notice was intended to insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice

> goes from the Secretary of Labor on to the employer involved. In turn this would promote the good faith negotiation of employers during the 60 day conciliation period and provide an opportunity for preservation of evidence and records for use at a trial necessitated by failure of negotiation.

494 F.2d at 488.

Both *Powell* and *Dartt* hold that the 180-day filing requirement is jurisdictional. This Court agrees. The real question here is whether plaintiff's prompt filing of a letter of complaint and copies of correspondence with the Labor Department satisfies this requirement. On the facts of this case, and with due regard for the remedial purpose of the Act, this Court holds that it does.

The sum of plaintiff's actions with regard both to defendant and to the Department of Labor was sufficient to satisfy the dual goals of the notice requirement. Defendant was given fair warning of the pendenc of plaintiff's grievance, and the Secretary was afforded the opportunity to pursue such efforts at conciliation as he deemed appropriate. Indeed, according to plaintiff's formal notice of intent to sue, dated October 2, 1975, the department conducted an initial investigation of the complaint in June and July of 1974. Plaintiff's file was then forwarded to four separate offices of the Department over a period of 15 months. Though no final disposition was ever made, there were apparently efforts to conciliate during this period.

Accordingly, defendant's motion to dismiss the complaint, and in the alternative for summary judgment, on the basis of plaintiff's alleged failure to give timely notice to the Secretary of Labor of his intent to sue, will be denied.

C. Failure to allege the date of notice of intent to sue.

The complaint fails to specify the date on which plaintiff gave notice of intent to sue to the Secretary of Labor. Plaintiff contends in his brief that such notice was given on June 17, 1974. In the Court's view, as elucidated in this opinion, notice was given on June 25, 1974. Since plaintiff was terminated on December 31, 1973, both dates are within 180 days of termination. Plaintiff is directed to file an amended complaint within 10 days hereof in which the date of filing of notice of intent to sue is set forth in the jurisdictional statement. On the condition that such an amended complaint be timely filed, the motion to dismiss the complaint, or in the alternative for summary judgment, based on Federal Rule of Civil Procedure 8(a)(1) will be denied.

APPENDIX D

29 U.S.C. 626

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. • • •

• • • • • • • • • • •

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 14(b) applies, within three hundrd days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

• • • • • • • • • • •

29 U.S.C. 633

FEDERAL-STATE RELATIONSHIP

SEC. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

• • • • • • • • • • •

42 U.S.C. 2000e-5

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. • • •

• • • • • • • • • • •

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such

proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

• • • • • • • • • • •

N.Y. Exec. L. § 291

Sec. 291. Equality of Opportunity a Civil Right. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right. (As amended by Ch. 803, L. 1975)

78-419

NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

JOS. SCHLITZ BREWING CO.
PETITIONER

v.

ROBERT E. SMITH
RESPONDENT

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE BY RESPONDENT

Robert E. Smith, Pro Se
7 Vista Palm Lane
Vero Beach, Fla. 32960

INDEX

CITATIONS

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No.

JOS. SCHLITZ BREWING CO., PETITIONER

V.

ROBERT E. SMITH, RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Robert E. Smith, Pro Se, respectfully prays and hopes that the Court will deny the Writ of Certiorari for a review of the opinion, judgment and order of the Third Circuit in this case in that Court.

JURISDICTION

The Third Circuit Court of Appeals decision of July 14, 1978, and thereafter, a Writ of Certiorari filed by the Petitioner to review the opinion and order of the aforementioned Court.

QUESTION PRESENTED

Whether the United States Supreme Court should consent to hear the Petitioner's request for a Writ of Certiorari inasmuch as the facts and situations involved in the instant case are identical to the *McGarvey v. Merck Co.*, 493F 2D 1401 CA 3 1974 Cert denied 419 US 836 1974. The Respondent has consistently maintained that the District Court erred at the time it reversed its previous May 1976 decision in using the *Goger* decision as its reason for reversal. In the July 14, 1978 decision, the Third Circuit Court of Appeals No. 77-1745 reversed its 1974 *Goger* decision and remanded/instant case for proceedings not inconsistent with that opinion.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein include Sections 14A (633A) and 14B (633B) contained in the ADEA of 1967, 29 USC Section 621 et seq. The Respondent relies on Section 14A (633A); the Petitioner relies on Section 14B (633B).

FEDERAL–STATE RELATIONSHIP AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

> Sec. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supercede any State action.

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

DISCUSSION

Although the Petitioner contends Section 14B is controlling and the Respondent erred when he failed to commence proceedings with the New York Human Rights Commission, the Respondent respectfully states that his attempt to file with this State agency was rebuked by the State because the Petitioner was no longer within the jurisdiction of New York State. The State then advised the Respondent to file his complaint with the United States Department of

Labor office nearest his home. See *McGarvey* and Judge Garth's July 14, 1978 opinion and his mention of the "uncontroverted" affidavit submitted by the Respondent.

The Secretary of Labor argues that the Section 14B was intended to give the complainant to the State the opportunity and time to achieve "informal conciliation, conference and persuasion." "The construction given this statute by the Secretary of Labor is persuasive, and, as it is that agency which is charged with the administration of the ADEA, it should be given greater deference." *Udall v. Tallman,* 380 US 1 85 S Ct 13 L ED ZD 616 (1964).

Judge Stern, in his opinion of May 28, 1976, in denying the defendant's motion to dismiss, stated:

> "After consideration of all decided cases, this Court holds that 633B Creates no jurisdictional requirement. The language of that section carefully avoids what would have been a simple statement of an exhaustion requirement and suggests that if a State proceeding is brought, the State agency should be given 60 days to act before Federal proceedings supplant it. See Title 29 United States'' Code 633A (emphasis added)

In the same opinion, Judge Stern refers to the *Vasques vs. Eastern Airlines, Inc.* in which Judge Pasquerra, after an exhaustive study of the legislative history of ADEA specifically endorses Judge Garth's opinion stated in *Goger.*

The Secretary in amicus curiae concurred with

Judge Garth. The Secretary, as an administrator or "policeman" if you will, is responsible for the application and administration of the ADEA of 1967 and accordingly should be recognized as an expert in the Act's application.

The Petitioner refers frequently to the *Curry v. Continental Air Lines* CA Cal 1975 513 F 2D 691 to further its argument and position. I quote from the opinion of 9th Circuit's opinion briefly - (decision of District Court was reversed).

> The primary issue in this case is whether the District Court lacked jurisdiction of the suit due to the appellant's failure to defer his complaint to a state agency as required by 29 USC Section 633B. Section 633B requires that a plaintiff defer to the State if (1) the State has a law prohibiting discrimination in employment due to age, and (2) the State has established or authorized a State agency to grant or seek relief from such discrimination. The parties agree that at all relevant times California has had a law making age discrimination in employment unlawful but <u>they disagree as to whether California has established or authorized to grant or seek relief from such discrimination.</u> (emphasis added)

The point I make is that the issue of filing with an appropriate state agency in the instant case exists; whereas the 9th Circuit opinion (of no consequence here) is conjectual. Therefore, I hope the Court disregards the Petitioner's attempt to use this case as one of pertinence to the issue in this instant case.

In *Goger* Judge Garth, in comparing ADEA with Title VII stated:

> "The various dissimilarities between the two Acts (and in particular the presence of Section 633A in ADEA which has no counterpart in Title VII) impel me to the conclusion that there is no requirement that a plaintiff must first attempt to utilize available State remedies before filing suit under the 1967 Act."

FURTHER

> "There is no requirement that a plaintiff must first attempt to utilize available state remedies before filing under the 1967 Act. Further, I do not believe it was the intent of Congress to require, prior to the institution of Federal action, the commencement of a State proceeding which under Sect. 633B need not be concluded and which in any event could be superseded by the filing of Federal action under Section 633A."

In *Vaughn v. Chrysler*, 382 F 143 (E D Mich 1974)the Court held that Sect. 633B "can be waived only when the plaintiff has justifiably and detrimentally relied upon official advice in neglecting to pursue State remedies." This Court cited *Goger* as an example of justifiable detrimental reliance in that a United States Department of Labor official advised Goger's counsel that she was free to institute her action under the Act inasmuch as there was no applicable judicial decision construing the Act.

The Respondent maintains that he, too, relied upon justifiable detrimental advice in filing with the

United States Department of Labor and therefore should be accorded no less equitable consideration than *Goger* and *McGarvey*.

Both Smith and McGarvey relied on such justifiably and detrimental advice from the New York and Pennsylvania Human Rights Commission agencies that their complaints were not within their jurisdiction/and accepted this advice by filing complaints with the United States Department of Labor.

STATEMENT OF THE CASE

Respondent, Robert E. Smith, was employed by the Petitioner, Jos. Schlitz Brewing Co., as its Industrial Relations Manager of the Brooklyn, New York, brewery for some twenty years (1952-1973). During the twenty-first year of employment he was appointed Resident Manager to manage and oversee the sale and eventual shutdown of the plant. As the Company had planned to close the plant since 1969, the Respondent was concerned about his employment until his mandatory retirement age of 65 in September 1976. Letters and conversations during this period indicated that the Company would offer (vs opportunity) the Respondent the first available vacancy. During the end of November 1973 and just prior to the sale of the plant, Scoutten, Senior Vice President of Industrial Relations, had contacted Mr. J. L. Thynne (a former assistant of the Respondent and fifteen years younger) to arrange for a personal interview for the position of Industrial Relations Manager at the new Syracuse, N.Y. plant (in con-

struction with an anticipated production start up date of January 1976). Mr. Thynne's interview in Milwaukee was delayed a few months because of his illness. Nevertheless, the interviews including luncheons with important top management superiors in attendance was held at the end of January 1974 with a number of executives with whom Thynne would either work for directly or with. This position was filled by Ronald Lauterbach (approximately thirty-five years old) in April 1974. The Respondent was advised on 12/21/73 that he was retiring on 12/31/73 by Mr. Scoutten in a hand-written note scribbled on a letter concerning another subject. After many unsuccessful attempts, through personal and phone conversation and correspondence to change Mr. Scoutten's and Mr. Uihlein's (chairman and president) minds, I decided to file charges with the New York Human Rights Commission or the United States Department of Labor complaining that the Company had illegally and wilfully involuntarily retired me in violation of the law.

Immediately following the last letter to Mr. Uihlein on May 2, 1974, I visited the New York Manhattan office of the United States Department of Labor and had conversation with Mr. Novak, who advised me to file my complaint with the United States Department of Labor office nearest my home (Paterson, New Jersey) I then called the New York State Human Rights Commission and asked to speak to someone expertised in advising me on how to file

a complaint of age discrimination against the Jos. Schlitz Brewing Co. After considerable conversation, mostly consisting of this person questioning me, he advised me that inasmuch as the Jos. Schlitz Brewing Co. was no longer conducting business directly in New York, and because it had no corporate or regional office in New York, the State of New York could not entertain any grievance against Schlitz, and that these requirements were essential ingredients enabling the State to handle such a matter. He then advised me to file suit with the United States Department of Labor nearest my home. I then proceeded to go to the United States Department of Labor in Paterson, N.J., where I filed my complaint on June 17, 1974.

On Dec. 23, 1975 I filed a complaint with the United States District Court in Newark, N.J.

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The *McGarvey v. Merck* suit contains the same basic facts and situations as contained in the instant case. Citation - *McGarvey v. Merck & Co.*, 493 F 2D 1401 Cert denied 419 U.S. 836. (Emphasis added.)

As Justice Garth states in his 3rd Circuit's opinion in July 14, 1978 decision:

> "The actions which Smith took in pursuit of his claim are set forth in detail in an uncontroverted affidavit, which was filed in opposition to Schlitz's motion for summary judgment." (emphasis added)

The Respondent contends that if the Petitioner

intends to controvert this affidavit, its action is untimely and irrelevant at this moment (see Page 2A of Judge Garth's opinion).

Again, from Judge Garth's 3rd Circuit opinion (see page 4A)

> [10] "At an earlier proceeding the District Court had denied Schlitz's motion to dismiss Smith's complaint as it interpreted Goger not as a strict jurisdiction but one that permitted equitable relief, 419 F Supp 770 12 FEP CASES 1494 D NJ 1976. (emphasis added)

Love vs. Pullman Co. 404 U.S. 522 - I quote from pages 17 and 18 from the Secretary of Labor amicus curiae dated January 1978:

> "The Court perceived no reason to require an aggrieved individual to take further action, noting that the creation of additional procedural technicalities are particularly inappropriate in a statutory scheme in which the layman, unassisted by trained lawyers, initiate the process" 1D at 527.

If in the opinion of the Court the Respondent failed in his effort to correctly file a complaint in accordance with the New York State Human Right Commission, the question is not answered as to what he should have done to file a legal complaint. In not understanding the combination of the United States Department of Labor's information pamphlet and

Section 14B, the respondent followed his interpretation of 14 A.

Gabrielle v. Chrysler Corp. 573 F 2D 949 (6th Circuit 1978)

> The Court could not find anything in the ADEA's legislative history to justify a different interpretation of 633 (b). The court held, however, that equitable considerations in that case excused the plaintiff's failure to resort to the appropriate state agency and the case was remanded to the district court for a hearing on the merits. [8]

> [8]The court's remand indicates that it did not consider prior resort to a state agency jurisdictional in the sense that absent such fact the district court would not have power to hear the case. Rather, it considered this requirement a statutory condition precedent to suit in federal court, subject to equitable considerations. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977).

Judge Garth filed a concurring opinion in *Goger* in which he agreed that the case should be remanded for consideration of the merits of the complaint. He disagreed, however, that 633 (b)'s similarity to 42 U.S.C. 2000e-5(c) mandated construing the two statutes similarly. He concluded "there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act." *Id.* at 17. He approved the position taken there by the Secretary of Labor as *amicus curiae* that resort to a state agency is completely optional and the 633 (b)'s sixty-day waiting period applies only *if* one has chosen to pursue state relief. [9]

We agree with the reasoning of Judge Garth in *Goger* and reject the holding of the majority in that case. [10]

ADDITIONAL REASONS FOR DENYING CERT.

1. The *McGarvey v. Merck Co.* 493 2D 1401 CA 3 1974 (cert denied 419 US 836 1974) should have been the precedent case involved when the Petitioner (defendant) submitted a motion to dismiss in February 1976 - instead of *Goger.*

2. The above *(McGarvey)* and the instant case are the only cases/on record with the same set of circumstances in which both were denied the opportunity to file complaints with the State agencies because they lacked jurisdiction. Both were advised to file with the United States Department of Labor.

3. If Section 14B's intent was to insist on resort to State filing, it would have taken a simple addition of a few words to make that a requirement. See Judge Stern's opinion in Petitioner's request for Writ of Certiorari - Appendix A.

4. Respondent's "uncontroverted" affidavit was not challenged. The Company was aware of my complaint to the United States Department of Labor as early as July 1974, so ignorance is no excuse.

5. What does a complainant do when a State agency refuses to accept a complaint and then advises complainant to file with the United States Department of Labor.

6. My original complaint filed June 17, 1974 was

transferred from Milwaukee, Chicago, New York City, Chicago, Washington, D.C., New York City back to Milwaukee and then finally to Chicago over a period of some seventeen months.

7. The Secretary of Labor in his "amicus" briefs amply, sufficiently and intelligently presented the intent of Sections 14A and 14B. See *Smith* and *Holliday* dated Jan. 1978.

8. See *Sutherland v. SKF* - Sutherland had not been advised by the United States Department of Labor of the existence of a State agency (Pennsylvania Human Relations Commission) by the United States Department of Labor until the Pennsylvania Human Rights Commission's time limitation had expired. The District Court extended equitable consideration and the case was heard on its merits.

CONCLUSION

The Respondent hopes and prays that the Court resolves this question (in his favor) so that future complainants will not consume some five years of their latter years arguing technical questions of minimal importance rather than deciding the merits of the case, "Did the Company discriminate because of age, or did it not."

If the members of the Court did have the pleasure of seeing "60 Minutes" on Sunday, Oct. 8, 1978, they would have heard actor and author, Garson Kanin report on a program entitled "Too Old? Sez Who?" Mr. Kanin, reports:

> "The Bureau of Labor Statistics tells us that men who are forcibly retired from their jobs have an average life span of 30 to 40 months. Now that's something to ponder because when a man is retired mandatorily he's not only being retired, he is being sentenced to death." Source: 60 Minutes, CBS Television Network, Sunday, Oct. 8, 1978.

As we all know, the law has been changed lately so that no person can be mandatorily retired before 70 years old.

In the "amicus" brief by the United States Department of Labor of the Holliday and Smith cases, the Department requests that the interpretation, application and decision by the United States Supreme Court provide for a more humane and a more common sense approach to a problem that contains pitfalls so important to the older citizens of this country whose time is running out. Senator Javits, the Act's principal sponsor, demonstrated concern to minimize delays, which plague so many of our agencies such as the Employee Economic/ Opportunities Council and the National Labor Relations Board . . . delays which are always unfortunate, but particularly so in the case of older citizens to whom by definition have relatively few years left.

Finally, it is the opinion of the Respondent that the Petitioner's desperate and insatiable desire to argue a very, very technical point contained in a

very ambiguous Section 14B is a defensive tactic to prevent the truth and merit of my complaint contained in documented records from surfacing in public court of law. I sincerely hope and pray that this Court will deny the Petitioner's request for a Writ of Certiorari but instead remand to the District Court for a hearing on the merits - whatever the result.

The ADEA is a remedial and humane Act which should be liberally construed to effectuate the purposes of the Act. The Court should recognize and give full weight to the fact that Respondent is not a lawyer but a layman trained in labor relations, some social, state and federal legislation but has never had exposure to the ADEA until early 1974. I have read in many ADEA complaints that many of our esteemed justices have stated that the intent of the law is most important; not meant to be punitive in its application but meant to be remedial and humanitarian and purposely designed to prevent indiscretions by employers in their relationships with their employees.

Therefore, the judgment of the United States Court of Appeals, Third District, should be upheld and sustained, and the case reinstated and remanded to the United States District Court for trial on the merits of the complaint, as the facts of the instant case differ from those in other Court of Appeals cases.

Respectfully submitted,

Robert E. Smith, pro se